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Amicus Brief in "Obergefell v. Hodges"

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Nos. 14-556, 14-562, 14-571 and 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES,
Director, Ohio Department of Health, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF THE CONSTITUTIONAL RIGHTS OF CHILDREN IN SUPPORT OF PETITIONERS

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VALERIA TANCO, et al.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM,
Governor of Tennessee, et al.,

Respondents.

———♦———

APRIL DEBOER, et al.,

Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,

Respondents.

———♦———

GREGORY BOURKE, et al.,
and TIMOTHY LOVE, et al.,

Petitioners,

v.

STEVE BESHEAR, Governor of Kentucky, et al.,

Respondents.

QUESTIONS PRESENTED

(1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

(2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTERESTS OF *AMICI CURIAE*[1]

Amici are scholars of family law and the law of equal protection. *Amici* submit this brief to: (1) draw attention to this Court's precedent unequivocally establishing that states may not punish children based on matters beyond their control and (2) demonstrate that state marriage bans inevitably and necessarily perform exactly this impermissible function because they deprive children of same-sex couples legal, economic and social benefits associated with the institution of marriage. Thus, *amici's* analysis, focusing on the equal protection rights of children, provides an independent basis for evaluating the constitutionality of the state marriage bans. Further, *amici's* analysis is directly responsive to the states' proffered justifications for their respective marriage bans.

SUMMARY OF ARGUMENT

"[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. This amicus brief is filed pursuant to a letter of consent from Petitioners' counsel in all four cases. Respondents have filed blanket consents on the docket in all four cases.

legal burdens should bear some relationship to individual responsibility or wrongdoing."[2]

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."[3] And yet state marriage bans and non-recognition bans (hereinafter "marriage bans") patently violate this most fundamental understanding of the equal protection guarantee. The children of same-sex couples are *identically situated* to the children of opposite-sex couples in terms of their need for and entitlement to the family-supporting rights and benefits provided by the institution of marriage. By providing these benefits to one group of children while denying them to another, state marriage bans impose permanent class distinctions between these two groups of children, in essence penalizing the children of same-sex couples merely because their parents are of the same sex.

In a powerful body of precedent, this Court has issued a clear prohibition against these types of laws. Specifically, this Court has made clear that states may not punish children by denying them government-conferred benefits,[4] based on matters beyond their

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[2] *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)) (alteration in original).

[3] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

[4] *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding state law that denied recovery to non-marital child for the wrongful death of the child's mother violated equal protection).

control, such as moral disapproval of their parents' relationship, or in an effort to affect adult conduct.[5] State marriage bans perform precisely this impermissible function. As demonstrated below, state marriage bans punish the children of same-sex couples by denying them the legal, economic and social benefits that flow from the institution of marriage, and they do so based on concerns completely outside the child's control – for example, in an effort to incentivize adult behavior – that is, "[e]ncourag[e] opposite-sex couples to enter into a permanent, exclusive relationship."[6] Punishing children to express a preference for some types of families over others, to reflect moral disapproval of same-sex relationships, to incentivize opposite-sex adult behavior, or to give effect to private biases utterly severs the connection between legal burdens and individual responsibility, a core tenet of equal protection law.[7] Thus, state marriage bans bespeak

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[5] *Plyler*, 457 U.S. at 219-20 (holding that arguments in support of withholding state benefits to undocumented entrants do not apply to children of undocumented entrants because the children cannot affect their parents' conduct or their own status).

[6] Brief for Defendants-Appellants at 37-38, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *37 ("Encouraging opposite-sex couples to enter into a permanent, exclusive relationship with which to have and raise children – into a marriage – is a legitimate state interest.").

[7] *See Plyler*, 457 U.S. at 220 ("[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." (quoting *Weber*, 406 U.S. at 175)).

invidious discrimination rather than an effort to attain legitimate governmental objectives.[8]

ARGUMENT

This Court's precedent dealing with the equal protection rights of children unequivocally establishes that states may not punish children for matters beyond their control.[9] State marriage bans do precisely this. They punish the children of same-sex couples

[8] *See Weber*, 406 U.S. at 175 (striking down state law denying workers' compensation proceeds to non-marital children, explaining "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illegal and unjust."); *Plyler*, 457 U.S. at 219-20 (striking down Texas law that withheld state education funds from school districts that enrolled children of Mexican descent not legally admitted to the United States, in part, because "children can neither affect their parents' conduct nor their own status"); *Levy*, 391 U.S. at 72 ("We conclude that it is invidious to discriminate against [non-marital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.").

[9] Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1608 (2013) (explaining how the government exclusion of children of same-sex couples is "the modern-day equivalent" of the exclusion of non-marital children); Tanya Washington, *In* Windsor's *Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children,* 48 IND. L. REV. 1, 49-63 (2014) (describing the adverse impact of state marriage bans and non-recognition laws on children in same-sex families as violating children's equal protection, substantive due process and procedural due process rights).

because they: (1) foreclose their central legal route to family formation; (2) categorically void their legal parent-child relationships created incident to out-of-state marriages; (3) deny them economic rights and benefits; and (4) inflict psychological and stigmatic harms.

I. THIS COURT'S PRECEDENT UNEQUIVOCALLY ESTABLISHES THAT STATES MAY NOT PUNISH CHILDREN BASED ON MATTERS BEYOND THEIR CONTROL

The Court's equal protection jurisprudence has expressed a consistent special concern for discrimination against children.[10] Why? Because discrimination against children always necessarily implicates two of the Equal Protection Clause's core values: promoting a society in which one's success or failure is the result of individual merit,[11] and discouraging the creation of

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[10] *See Pickett v. Brown*, 462 U.S. 1, 7 (1983) (noting explicitly "a special concern for discrimination against non-marital children"); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) (stating that the Court has a "special concern" with education because it is the " 'principal instrument in awakening the child to cultural values,' " preparing children for professional training, and helping children adjust to the environment (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

[11] *See Plyler*, 457 U.S. at 222; *see also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (identifying meritocracy as core equal protection value).

permanent class or caste distinctions.[12] Where laws function to place children in a distinct, disadvantaged class based on the conduct of their parents or other adults, these principles are violated.[13]

Marriage bans contravene these important values. Indeed, the state defendants in these cases explicitly concede that marriage is good for children, yet state marriage bans categorically exclude an entire class of children – the children of same-sex couples – from the legal, economic and social benefits of marriage that the states tout. In defending this differential treatment, the states make clear that marriage bans are meant to express and enforce a bare preference for families headed by opposite-sex couples over families headed by same-sex couples. Even if such a bare preference for one social group over another were a legitimate state interest (which it likely is not), its inescapable corollary – a bare preference for the *children* of opposite-sex couples over the *children* of same-sex couples – cannot be deemed legitimate.

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[12] *See Plyler*, 457 U.S. at 234 (Blackmun, J., concurring); *see also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (discussing goal of Equal Protection Clause to eliminate laws that tend to create social castes).

[13] *Weber*, 406 U.S. at 175 (stating that condemning a child for the actions of his parents is "illogical and unjust"); *see Levy*, 391 U.S. at 72 (holding that it is invidious to discriminate against non-marital children for the actions of their parents over which they have no control).

Thus, state marriage bans directly invoke this Court's special role in protecting children against unfair discrimination – a role the Court has faithfully fulfilled on multiple occasions.

A. Discrimination Against Non-Marital Children

This Court has consistently expressed special concern with discrimination against children – in particular protecting their right to self-determination and to flourish fully in society without being hampered by legal, economic and social barriers imposed by virtue of the circumstances of their birth.

This concern is perhaps most strongly expressed in the Court's treatment of non-marital children.[14] The United States has a long history of discrimination against children born to unmarried parents.[15]

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[14] *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (stating that the status of non-marital children "is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual"); *Weber*, 406 U.S. at 175; *see Levy*, 391 U.S. at 72.

[15] 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("[R]ights [of a non-marital child] are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody."); Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498 (1967); *but see Levy*, 391 U.S. at 70 ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.").

Because of society's moral condemnation of their parents' conduct, non-marital children were denied legal and social benefits to which marital children were entitled.[16] They could not inherit property; further, they were not entitled to financial parental support, wrongful death recovery, workers' compensation, social security payments, and other government benefits.[17]

In the early 1940s, criticism of the treatment of non-marital children gained traction and eventually became a part of the political and legal debates of the civil rights movement.[18] In 1968, Professor Harry Krause and civil rights lawyer Norman Dorsen advanced child-centered arguments in *Levy v. Louisiana*,

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[16] *Amici* do not endorse any argument that the adult relationships or conduct (whether same-sex or opposite-sex) advanced by states to support state marriage bans are, in fact, immoral, irresponsible, or a form of wrongdoing. *Amici* simply argue that the state justifications that advance such arguments cannot be deployed to punish children.

[17] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346-47 (2011).

[18] *See* JUSTINE WISE POLIER, ILLEGITIMACY AND THE LAW 13 (1944) (NOW Collection, Box 45, Folder 555, on file with the Schlesinger Library, Radcliffe Institute, Harvard Univ.); Martha Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 90 (2003); Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1608-15 (2013) (explaining the history of non-marital status cases).

the first equal protection challenge on behalf of non-marital children.[19]

The facts of the *Levy* case are compelling. Louise Levy, an unmarried black mother with five young children, died from the medical malpractice of a state hospital.[20] Born outside the bounds of marriage, the Levy children were excluded by state law from a "right to recover" for their mother's death. Thelma Levy, Louise's sister, sued Louisiana on their behalf.[21] The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim on the grounds that they were not "legitimate," noting that such a policy was justified because "'morals and general welfare . . . discourage[ ] bringing children into the world out of wedlock.'"[22] In a groundbreaking legal victory for children, this Court reversed. This Court explained its departure from the practice of deferring to legislative decisions, noting, "we have

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[19] Brief for Appellee, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 508), 1968 WL 112826.

[20] *Levy*, 391 U.S. at 70.

[21] *Id.* In the same year as *Levy*, this Court decided a companion case, *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 74-76 (1968), striking down a Louisiana law that denied a mother wrongful death recovery for her deceased son because he was born outside of marriage; *but see Labine v. Vincent,* 401 U.S. 532, 539-40 (1971) (denying a non-marital child inheritance from her father who died without a will).

[22] *Levy*, 391 U.S. at 70 (quoting *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law. *Levy v. Louisiana*, 250 La. 25 (1967).

been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[23] This Court determined Louisiana's actions were a form of invidious discrimination driven by the child's status as "illegitimate" – a status that was unrelated to the injury to the mother.[24]

Four years after *Levy*, in *Weber v. Aetna Casualty & Surety Co.*,[25] this Court struck another blow to government conduct that penalized children based on moral disdain of the parents' conduct. In *Weber*, Henry Clyde Stokes died of work-related injuries. At the time of his death, he lived with Willie Mae Weber.[26] Stokes and Weber were not married, but were raising five children together.[27] One of the children was born to Stokes and Weber, while four others had been born to Stokes and his lawful wife who had previously been committed to a mental hospital.[28] Weber and Stokes' second child was born shortly after Stokes' death.[29] The Louisiana Supreme Court upheld a lower court decision disbursing workers' compensation proceeds to the four marital children while

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[23] *Levy*, 391 U.S. at 71 (internal citations omitted).

[24] *Id.* at 72.

[25] 406 U.S. 164 (1972).

[26] *Id.* at 165.

[27] *Id.*

[28] *Id.*

[29] *Id.*

denying such proceeds to the two non-marital children.[30]

Once again, this Court reversed and reiterated that a state may not place its moral objection of a child's parents' conduct at the feet of the child by withholding government benefits. To do so places the child at an economic disadvantage for conduct over which the child has no control. This Court explained that, while it could not prevent social disapproval of children born outside of marriage, it could "strike down discriminatory laws relating to the status of birth."[31] This Court recognized that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[32]

From 1968 to 1986, the Supreme Court heard more than a dozen cases challenging laws that disadvantaged non-marital children, before explicitly holding that this classification was of such concern that differential treatment of non-marital children warranted intermediate scrutiny.[33]

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[30] *Id.* at 167-68.

[31] *Weber*, 406 U.S. at 175-76.

[32] *Id.* at 169.

[33] *See Clark v. Jeter*, 486 U.S. 456, 465 (1988) (holding that Pennsylvania statute was unconstitutional under intermediate scrutiny).

B. Discrimination Against Children in Other Contexts

This Court has also expressed special concern about unfair discrimination against children in other contexts. Specifically, *Weber's* moral and jurisprudential clarity about discrimination against children was echoed years later in *Plyler v. Doe*.[34] At issue in *Plyler* was a state law that sought to deny public education to the children of undocumented immigrants. In deciding the case, this Court relied heavily on the factual findings of the district court to the effect that: (1) the law did nothing to improve the quality of education in the state and (2) it instead tended to "permanently lock[ ]" the children of undocumented immigrants "into the lowest socio-economic class."[35]

This Court highlighted the foundational mission of the Equal Protection Clause: "to work nothing less than the abolition of all caste-based and invidious class-based legislation."[36] To be sure, not all laws that distinguish between groups fall under this prohibition. But laws that determine the legal, economic and social status of children based on the circumstances of their birth surely do.

As this Court explained in *Plyler*, "[l]egislation imposing special disabilities upon groups disfavored *by virtue of circumstances beyond their control* suggests

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[34] 457 U.S. 202 (1982).

[35] *Id.* at 208.

[36] *Id.* at 213.

the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[37] The *Plyler* Court went on to emphasize that, even though it was arguably permissible to disapprove of the presence of undocumented immigrants in the United States, it did not justify "imposing disabilities on the minor *children* of" undocumented immigrants.[38] While "[t]heir parents have the ability to conform their conduct to social norms," the children "can affect neither their parents' conduct nor their own status."[39] This Court further explained, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[40] Thus, discrimination against children is unjust in part because it contravenes "one of the goals of the Equal Protection Clause," which is, "the abolition of governmental barriers presenting unreasonable

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[37] *Id.* at 216 n.14 (emphasis added).

[38] *Id.* at 219-20.

[39] *Id.* at 220 (internal quotation marks omitted). *Amici* wish to stress here that they do not believe that same-sex couples should in any way be expected to "conform their conduct to social norms" to the extent those norms prefer heterosexual relationships. Rather, the point of *Plyler* and the other child-centered cases is that it is categorically impermissible to punish children based on disapproval of their parents' status or conduct.

[40] *Id.*

obstacles to advancement on the basis of individual merit."[41]

Levy, *Weber*, and *Plyler* establish that discrimination against children cannot be justified based on moral disapproval of their parents' marital or immigration status. Further, such discrimination cannot be justified in an attempt to incentivize adults to marry before having sex or to obtain proper immigration documentation.

Marriage bans violate these prohibitions. The states recognize the legal, social and economic benefits of marriage, yet seek to deny them to children of same-sex couples because of moral disagreement of same-sex relationships, to enact a bare preference for families headed by a man and a woman, and in an attempt to incentivize opposite-sex couples to procreate responsibly within the bounds of marriage. The states cannot impose such disabilities on minor children without running afoul of well-established equal protection law.

C. The Impermissibility of Enforcing Private Biases Regarding "Ideal" Family Structures

Another, related, impermissible justification for governmental discrimination in any context is the enforcement of private bias. In the seminal case of

[41] *Id.* at 222.

Palmore v. Sidoti,[42] the Court took the unusual step of reviewing a state family court's custody award. Following divorce, the mother in the case was awarded custody of the couple's infant child. Both the father and the mother were white. Subsequent to the divorce, the mother entered into a relationship with and married a black man. The father sought custody of the child based on these "changed conditions."[43] The family court explicitly found that there was no issue with either the mother's or the stepfather's parental fitness.[44] Nonetheless, the court took to heart the recommendation of a counselor, who expressed concern about the "social consequences" for a child being raised in "an interracial marriage."[45] Specifically, the counselor opined: "[T]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice."[46]

On this basis, "the [family] court . . . concluded that the best interests of the child would be served by awarding custody to the father."[47] While acknowledging that the father's disapproval of the relationship

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[42] 466 U.S. 429 (1984).

[43] *Id.* at 430.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 431 (emphasis added) (internal quotation marks omitted).

[47] *Palmore*, 466 U.S. at 431.

was not a sufficient basis for awarding him custody, the family court determined that, because society did not yet fully accept interracial relationships, the child would inevitably "suffer from . . . social stigmatization."[48]

This Court acknowledged that the stated interest in serving the best interests of the child was "a duty of the highest order."[49] However, the Court's chief concern was in regard to the actual *function* of the ruling, which gave legal effect to private bias.[50] This Court held that the family court's decision, which determined the best interests of the child based on societal disapproval of the parents, violated equal protection, famously stating: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[51]

Here, marriage bans deny children the legal, economic and social benefits of marriage by giving effect to private bias in two different ways. First, as detailed above, they give effect to private bias against same-sex couples.[52] Second, as discussed below, they

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[48] *Id.*

[49] *Id.* at 433.

[50] *See id.*

[51] *Id.*

[52] The bias reflected in the arguments against same-sex marriage range from assumptions about the differences between same-sex and opposite-sex couples, such as the biological distinctions in procreation make opposite-sex couples more suitable parents, to extremely negative characterizations of gay men,

(Continued on following page)

give effect to private bias based on undisguised stereotypes about appropriate gender roles in parenting. It is well established that laws may not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[53] Assumptions about expected parenting roles that men and women must or should perform based on gender alone falls squarely within the gender stereotyping that has been deemed impermissible in equal protection law, including in decisions about parental roles.

For example, in *Caban v. Mohammed*,[54] the Court struck down a New York law that permitted unwed mothers to block the adoption of their children by denying consent to potential adoptees, but did not grant this consent-based objection to unwed fathers.[55]

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lesbians and bisexuals. For example, in Ohio, marriage ban proponents explicitly supported their position by arguing that same-sex relationships exposed the participants to "extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." Brief for Plaintiffs-Appellees at 20, *Obergefell v. Wymyslo*, 772 F.3d 388 (6th Cir. 2014) (No. 14-3057), 2014 WL 1745560, at *5.

[53] *See United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" as an insufficient justification under Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding invalid justification based on state's preference for allocation of family responsibilities under which wife plays a dependent role).

[54] 441 U.S. 380 (1979).

[55] *Id.* at 384.

The father challenged this gender-based distinction as an equal protection violation.[56] The mother argued that the distinction between unwed mothers and unwed fathers was based on a fundamental difference between the sexes, because "a natural mother, absent special circumstances, bears a closer relationship with her child" than a father.[57] This Court disagreed, finding that "maternal and paternal roles are not invariably different in importance," and even if unwed mothers were closer to their newborn children, "this generalization concerning parent-child relations would become less acceptable as the age of the child increased."[58] The court "reject[ed] . . . the claim that the broad, gender-based distinctions of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[59]

In sum, states may not punish children based on the status of their birth, regardless of whether the state's aim is to express moral disapproval of adult conduct, control or incentivize adult behavior, or give effect to private bias about same-sex couples or stereotypes about the parenting abilities of men and women.

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[56] *Id.* at 385.

[57] *Id.* at 388.

[58] *Id.* at 389.

[59] *Id.*

II. STATE MARRIAGE BANS HARM CHILDREN OF SAME-SEX COUPLES BY DEPRIVING THEM OF THE IMPORTANT LEGAL, ECONOMIC, AND SOCIAL BENEFITS OF MARRIAGE WITHOUT JUSTIFICATION

As demonstrated above, this Court's precedent establishes that states may not punish children for matters beyond their control. Matters beyond the child's control include moral disapproval of adult conduct, efforts to control or incentivize adult behavior, or practices that give effect to private bias. State marriage bans do precisely this.

A. State Marriage Bans Impose Legal, Economic and Social Harms on the Children of Same-Sex Couples

After this Court's decision in *United States v. Windsor*,[60] there is little room for debate on the issue of whether marriage bans harm children. This Court noted the inevitable psychic harm imposed by the Defense of Marriage Act ("DOMA"):

> The differentiation [between same-sex and opposite-sex couples] . . . humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other

[60] 133 S. Ct. 2675 (2013).

> families in their community and in their daily lives.[61]

This Court further noted the financial injury the federal marriage ban inflicted on children:

> DOMA . . . brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.[62]

Marriage bans harm children because they: (1) foreclose the central legal route to family formation;[63] (2) categorically void existing legal parent-child

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[61] *Id.* at 2694.

[62] *Id.* at 2695 (internal citation omitted).

[63] Michigan, Ohio, Kentucky, and Tennessee deny same-sex couples other avenues of legal parentage. MICH. COMP. LAWS. ANN. § 710.24 (West 2014) (allowing joint adoption by married couples); OHIO REV. CODE ANN. § 3107.03 (West 2014) (allowing adoption only by unmarried adult, or, jointly by husband and wife); KY. REV. STAT. ANN. § 199.470 (West 2014) (allowing adoption only by unmarried adult, or, jointly by husband and wife). Even if they offered other avenues, the existence of alternative forms of legal parentage does not mitigate the claim that precluding formation of the parent-child relationship through marriage deprives children of one of the most protected forms of parentage – parentage incident to an existing marriage. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124-27 (1989). For a detailed description of the limits of alternative parentage *see* Tanya Washington, *In* Windsor's *Wake: Section 2 of DOMA's*

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relationships created incident to out-of-state marriages;[64] (3) deny children of same-sex couples economic rights and benefits and other legal protections;[65] and (4) inflict psychological and stigmatic harm.[66]

Defense of Marriage at the Expense of Children, 48 IND. L. REV. 1, 16-26 (2014).

[64] *Henry v. Himes*, 14 F. Supp. 3d 1036, 1052 (S.D. Ohio 2014) (describing the discriminatory impact of Ohio's non-recognition law the court observed, "Under Ohio law, if the [Plaintiffs'] marriages were accorded respect, both spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple. . . . However, Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth certificates identifying both women in these couples as parents of their expected children.").

[65] *See De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 553 (W.D. Ky. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979-80 (S.D. Ohio 2013).

[66] For further explanation of the harms to children, *see* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 412 (1999) ("The preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship."); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 586 (2005); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 85-89 (2011); Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1595-1608 (2013).

1. Family Formation

In most jurisdictions, both parties to a heterosexual marriage are presumed to be the legal parent of children born into the marriage.[67] This marital presumption of parentage protects children born into opposite-sex marriages by establishing filial relationships with both parents, even if children are not biologically related to both parents.[68] The permanency, consistency and stability inherent in the parent-child relationship has been recognized by the states as securing children's best interests in the adoption, custody, and visitation contexts.[69]

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[67] *Michael H.*, 491 U.S. at 124-27 (describing the utility and history of the marital parentage presumption). *See also* OHIO REV. CODE ANN. § 3111.03(A)(1) (West 2014) (providing Ohio's codification of the marital parentage presumption); KY. REV. STAT. ANN. § 406.011 (West 2014) (providing Kentucky's codification of the marital parentage presumption); *Family Independence Agency v. Jefferson*, 677 N.W.2d 800, 806 (Mich. 2004) ("The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law.").

[68] *Michael H.*, 491 U.S. at 124-27.

[69] TENN. CODE ANN. § 36-6-401 (West 2014); *Armbrister v. Armbrister*, 414 S.W.3d 685, 694-95 (Tenn. 2013); *Irvin v. Irvin*, No. M2011-02424-COA-R3CV, 2012 WL 5993756, at *14, n.9 (Tenn. Ct. App. Nov. 30, 2012); *Vibbert v. Vibbert*, 144 S.W.3d 292, 295 (Ky. Ct. App. 2004) ("We now hold that the appropriate test . . . is that the courts must consider a broad array of factors in determining whether the visitation is in the child's best interest. . . ."); *Still v. Hayman*, 794 N.E.2d 751, 755-56 (Ohio Ct. App. 2003) ("A strong public policy exists that it is in the child's interest that a parent-child relationship be formed. Moreover,

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While biology provides one of the easiest guarantees of parentage and is often available to at least one parent in same-sex couples, same-sex marriage bans preclude the marital parentage presumption from establishing a filial relationship between children and their non-biological same-sex parents.[70] Even more

public policy dictates that a parent is responsible to provide for the health, maintenance, welfare, and well-being of his child. In accordance with these public policies, it can be concluded that Ohio favors the establishment of a parent-child relationship when it is possible." (internal citations omitted)); *In re Spalding*, No. 320379, 2014 WL 4628885, at *2 (Mich. Ct. App. Sept. 16, 2014) ("In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." (internal quotation marks omitted)); *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005) ("The paramount consideration in child custody cases is the child's best interests. In disputes between legal parents, we determine a child's best interests in light of the comparative fitness of the parents and must take into consideration . . . [t]he stability of the family unit of the parents." (internal citations omitted)); *Cummings v. Cummings*, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at *5 (Tenn. Ct. App. Oct. 15, 2004) (noting that "the welfare and best interests of the child are the paramount concern in custody, visitation, and residential placement determinations," and "a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care" is an important factor in serving the best interests of the child).

[70] The District Court in *DeBoer* credited the plaintiffs' expert testimony regarding the adverse impact of marriage bans on children in same-sex families and observed, "children being raised by same-sex couples have only one legal parent and are at risk of being placed in 'legal limbo' if that parent dies or is incapacitated. Denying same-sex couples the ability to marry therefore has a manifestly harmful and destabilizing effect on

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harmful to children's best interests are non-recognition laws, which categorically negate existing filial relationships between children and their non-biological same-sex parents because these laws refuse to recognize their parents' legal out-of-state same-sex marriages.[71] The effect of exclusionary marriage laws is to render these children legal strangers to one of their parents in direct contravention of their best interests.[72]

Notwithstanding states' characterization of marriage bans and non-recognition laws as child protective measures, these laws harm the children they purport to protect.[73] Children in same-sex families are deprived of the permanency, consistency, and stability inherent in the parent-child relationship, which has been recognized as securing children's best interests in the adoption and custody contexts.

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such couples' children." *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 764 (E.D. Mich. 2014).

[71] *Henry*, 14 F. Supp. 3d at 1054; *Bourke*, 996 F. Supp. 2d at 553.

[72] As one judge observed, while questioning the constitutionality of depriving children of the opportunity to have *de facto* parents recognized as legal parents, "[a law] that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of . . . the best interests of the child." *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (citation omitted).

[73] *DeBoer*, 973 F. Supp. 2d at 771.

Since this Court's decision in *United States v. Windsor*, state and federal courts have acknowledged states' legitimate and compelling interests in promoting children's welfare and well-being.[74] However,

[74] *Bourke*, 996 F. Supp. 2d at 553 ("The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex. . . . [T]he Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review."); *Henry*, 14 F. Supp. 3d at 1056 ("[C]hild welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples."); *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. . . . Defendants have presented no evidence of any such effect."); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) ("Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478-80 (E.D. Va. 2014) ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. . . . [N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. . . . The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage."); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1212 (D. Utah 2014) ("[T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and

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many courts, in full view of the harmful impact of these laws on children in same-sex families, have determined such laws fail even rational basis review because they hinder rather than advance child welfare. The District Court in *Himes* explained:

> Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. . . . The children in Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal

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its goal of having more children raised in the family structure the State wishes to promote. . . . [T]he State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiff's assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." (internal citation omitted)); *De Leon*, 975 F. Supp. 2d at 653 ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted. . . . Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing.").

> parents . . . without a sufficient justification. No such justification exists.[75]

The states contend that it is best for a child to have a relationship to two married parents. If this is true, then excluding families headed by same-sex couples from marriage thwarts this goal.

2. Economic Harm

State marriage bans harm the economic well-being of the children of same-sex couples even more extensively than the economic impact of DOMA described in *Windsor*. Similar to the laws that discriminated against non-marital children, state marriage bans deny children of same-sex couples countless rights and benefits that would otherwise flow from a legal relationship with their non-biological parent. These benefits are designed as a safety net to protect children in the event of parental loss or other life events, including workers' compensation benefits, state health insurance, civil service benefits, social security benefits, inheritance, and wrongful death proceeds.[76] The lack of a legal relationship between

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[75] *Henry*, 14 F. Supp. 3d at 1054-55.

[76] For a list of benefits, *see* Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1603-07 (2013); Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 MOD. AM. 3, 4-6 (2007); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75-76 (2006).

the child and her non-biological same-sex parent (as well as the parents' lack of a legally recognized relationship to one another) also places the child at risk in the event that her parents separate or divorce. The child may be precluded from recovering child support or the benefits of a settled custody arrangement.[77]

The denial of these benefits is not simply a one-time injury; rather, the exclusion over the course of a child's lifetime is compounding and cumulative, and it disrupts one of the primary functions of marriage – to provide stability, financial and otherwise, for future generations.[78]

3. Psychological Harm

In addition to harms to family formation and economic interests, same-sex marriage bans also inflict psychological harm by symbolically expressing the inferiority of families headed by same-sex couples and the children in those families. This Court has

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[77] *See* Smith, 90 WASH. U. L. REV. at 1604-05.

[78] It is important to recognize that contrary to stereotypes, LGBT people raising children may face economic disadvantage. Single LGBTs with children are three times more likely than non-LGBTs to live near the poverty level, while same-sex couples with children are twice as likely as comparable opposite-sex couples to live near the poverty level. Gary J. Gates, The Williams Institute, UCLA School of Law, *LGBT Parenting in the United States*, at 1 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (last visited March 2, 2015).

previously considered stigma to children as relevant in its assessment of the constitutionality of state action. Highlighting the adverse psychological effects of *de jure* segregation on black children, for example, a unanimous Court announced in *Brown v. Board of Education*:[79]

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[80]

This Court has also acknowledged psychic harm to undocumented children For example, in *Plyler v. Doe*,[81] discussed above, this Court described the effect of the law as levying an "inestimable toll . . . on the social[,] economic, intellectual, and psychological well-being of the individual."[82] The Court went on to emphasize the relevance of the law's harmful impact on children, stating:

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[79] 347 U.S. 483.

[80] *Id.* at 494 (internal quotation marks omitted).

[81] 457 U.S. 202 (1982).

[82] *Id.* at 222.

> Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. . . . In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[83]

The states' characterization of marriage bans as child-protective measures that promote "responsible procreation and optimal child-rearing" is at odds with the adverse impact of the legislation on all children with gay or lesbian parents. The effect of these bans is to stigmatize the families of which these children are a part, and, by extension, to stigmatize these children.[84]

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[83] *Id.* at 223-24.

[84] Aff. of Gregory M. Herek, Ph.D. at ¶¶ 29, 30, *Mass. v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012) (No. 1:09-cv-11126-JLT), 2010 WL 604593 ("Denying . . . recognition to married same-sex couples devalues and delegitimizes their relationships. It conveys the government's judgment that committed intimate relationships between people of the same sex . . . are inferior to heterosexual relationships, and that the participants in a same-sex relationship are less deserving of society's recognition than heterosexual couples. . . . To the extent that laws differentiate majority and minority groups and accord them differing statuses, they highlight the perceived 'differentness' of the minority and thereby promote and perpetuate stigma.") ("*Stigma* refers to an enduring condition, status, or attribute that is negatively valued by society . . . and that consequently disadvantages and disempowers those who have it.").

Children of same-sex couples, like the victims of racial segregation and immigrant children excluded from educational opportunities, suffer the harmful psychological effects of the condemnation of their families, which, as the Court noted in *Brown*, is compounded by the law's sanction of this discrimination.[85]

Significantly, this Court in *Windsor* acknowledged the stigmatic harm DOMA inflicted on children and explained:

> [I]t humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.[86]

State law, as the loci of family law, inflicts an even greater psychological and stigmatic harm than

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[85] It is important to note that many children are at the intersections of these categories. Half of the children under 18 who live with same-sex couples are children of color. Gary J. Gates, The Williams Institute, UCLA School of Law, *LGBT Parenting in the United States*, at 1 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (last visited March 2, 2015).

[86] *Windsor*, 133 S. Ct. at 2694-96.

DOMA on the children with gay and lesbian parents. *Brown*, *Plyler* and *Windsor* make it clear that the stigma a discriminatory law imposes – particularly on children – is a worthy consideration when analyzing the constitutionality of that law. The marriage bans send a direct message to children of gay and lesbian parents that their families are inferior and less worthy of legal recognition.

B. The States' Justifications for Imposing these Discriminatory Harms are Patently Impermissible

As demonstrated above, this Court's precedent establishes that states may not punish children for matters beyond their control. Matters beyond the child's control include moral disapproval of adult conduct, efforts to control or incentivize adult behavior, or practices that give effect to private bias. State marriage bans do precisely this.

The justifications offered by the states in defense of their respective marriage bans fall squarely within this prohibited category of government action. In arguing before the Sixth Circuit, the various states involved in this case presented a limited number of justifications for their marriage bans. Several of the states advance the "responsible procreation argument," which contends that state marriage bans "[e]ncourage[ ] opposite-sex couples to enter into a

permanent, exclusive relationship within which to have and raise children"[87] or "encourage . . . sexual interactions [between a man and a woman] to occur in long-term, committed relationships, so that the resulting children will be raised by both their mom and their dad."[88] This is a naked attempt to incentivize adult behavior at the cost of children's welfare, and is not permitted under the body of law discussed above.

The states further contend that the marriage bans reflect a belief "that children benefit from being raised by both a mother and a father" because "[m]en and women are different, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea."[89] This justification reflects a bare preference for certain families over others, bias against same-sex couples and gender stereotyping. Similarly, the contention that states

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[87] Brief for Defendants-Appellants at 37, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *38.

[88] Brief for Defendants-Appellants at 63, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *52. *See also* Brief for Defendants-Appellants at 34, *Tanco v. Haslam*, 772 F.3d 388 (6th Cir. 2014) (No. 14-5297), 2014 WL 1998675, at *26 (promoting "a 'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot").

[89] Brief for Defendants-Appellants at 51, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *40.

may "promote marriage in the setting where children naturally (biologically) come from – the union of a man and a woman"[90] seeks to enforce a bare preference for so-called "biological" families.

Thus, the states concede that their marriage bans represent an effort to incentivize adult behavior ("encouraging" adults in opposite-sex couples to enter the institution of marriage and to procreate only within that institution) as well as a bare preference for families headed by opposite-sex couples and/or families formed "biologically" or "naturally." Even if these were legitimate state interests standing alone, they are – per precedent and fundamental notions of fairness – impermissible bases for imposing harms on the children of same-sex couples. Further, it does not take much imagination to see that the preference for families headed by opposite-sex couples sounds in private bias against and moral disapproval of same-sex couples.

As demonstrated above, none of these justifications is a permissible basis for imposing discriminatory harms on children.

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[90] Brief for Defendants-Appellants at 63, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 1998573, at *52.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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